ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

83-6215

NO.

ROBERT FRANKLIN GODFREY
Petitioner,

v.

ROBERT FRANCIS, Warden,
Georgia Diagnostic and
Classification Center
Respondent

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SUPREME COURT, U.S.

UPON A PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

1. Whether Petitioner's resentencing trial constituted a violation of his double jeopardy clause of the constitution?

2. Whether the failure to exclude veniremen irrevocably committed to the imposition of the death penalty violated Petitioner's Sixth Amendment right to an impartial jury?

3. Whether the trial court's instructions on intent and malice impermissibly shifted the burden of proof as to these two elements to Petitioner in violation of Sandstrom v. Montana, 444 U.S. 510 (1979).

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NO. 83-

IN THE SUPREME COURT OF THE UNITED STATES

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v.

ROBERT FRANCIS, Warden,
Georgia Diagnostic and
Classification Center,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner, Robert Franklin Godfrey, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia in this case.

CITATION TO OPINION BELOW

The unreported opinion of the Supreme Court of Georgia is attached hereto as Appendix A. A Motion for Rehearing was filed and was denied on November 29, 1983 and is attached hereto as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Georgia was issued on November 4, 1983. A timely petition for rehearing was denied on November 29, 1983. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3), Petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution of the United States, which provides in relevant part:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . nor shall be deprived of life, liberty or property without due process of law;"

2. The Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> ". . . in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .; and to . . . have assistance of counsel for his defense."

3. The Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> ". . . Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

4. The Fourteenth Amendment to the Constitution of the United States which provides in relevant part

> ". . . nor shall any State deprive any person of life liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. Georgia Code Ann. § 27.2534.1(b)(7) which provides for the death penalty where:

> ". . . the offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim."

6. Georgia Code Ann. § 27.2534.1(b)(2), which provides for the death penalty where:

> ". . . the offense of murder, rape, armed robbery or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree."

7. Georgia Code Ann. § 26-1101(c).

> "A person convicted of murder shall be punished by death or life imprisonment."

8. Georgia Code Ann. § 27-2503:

> 27-2503 Presentence hearings in felony cases (a) Except in cases in which the death penalty may be imposed, upon the return of a verdict of "guilty" by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In such hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment,

including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument. In cases in which the death penalty may be imposed, the judge when sitting without a jury shall follow the additional procedure provided in Section 27-2534.1. Upon the conclusion of the evidence and arguments the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

(b) In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided in subsection (a) of this section. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in Section 27-2534.1, exist and whether to recommend mercy for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law.
(Acts 1974, pp. 352, 357.)

STATEMENT OF THE CASE AND FACTS

Robert Franklin Godfrey was convicted for the murders of his wife, Mildred, and his mother-in-law, Chessie Wilkerson, and for the aggravated assault upon his daughter, Tracie, by a jury in the Superior Court of Polk County,

Georgia on March 9, 1978. At the time of the convictions, Mr. Godfrey was in his late forties. He was a decorated veteran of two wars and never before had been convicted of a crime. Mr. Godfrey presented no defense on the merits at trial, but, instead, presented a defense of insanity.

The evidence at trial showed that Mr. Godfrey had a history of acute alcoholism and had been hospitalized for treatment of that disease at least four times. On those occasions, his drinking had resulted in violent episodes with his wife, and she had left him, only to reconcile when he agreed to receive treatment.

On September 5, 1977, Mr. Godfrey and his wife had another argument and, again, she left him, eventually moving in with her mother, who lived in a trailer nearby. Despite several attempts by Mr. Godfrey during the next two weeks to reconcile with his wife, she refused to return to him. On September 20, 1977, after returning home from his job as a nurse, Mr. Godfrey spoke twice with his wife by telephone. The first conversation ended in an argument, with Mrs. Godfrey again refusing to reconcile. The second, which took place at approximately 7:30, became even more heated, and ended with a final rejection by Mrs. Godfrey of her husband's attempts to save their marriage.

Shortly thereafter, Mr. Godfrey, armed with his shotgun, walked to his mother-in-law's trailer and, through a window, shot his wife in the forehead, killing her instantly. He entered the trailer, hit his daughter Tracie with the butt of the gun as she ran out of the house, then shot his mother-in-law in the head, also killing her instantly. Mr. Godfrey then called the sheriff's office and told the dispatcher what he had done. When he hung up, he went outside, placed the shotgun in the branches of an apple tree, and waited for the officers to arrive.

Dr. William S. Davis, a psychiatrist on the clinical teaching staff of Emory Medical School and Past President of the Georgia Psychiatrists Association, who had treated Mr. Godfrey for alcoholism in the mid-60's and had examined him, pursuant to court order prior to trial, testified in support of Mr. Godfrey's defense of insanity. Dr. Davis opined that the second telephone call between Mr. Godfrey and his wife on the evening of September 20, 1977 had created an emotional trauma within Mr. Godfrey that had caused him to enter an altered state or consciousness, known as "dissociation," and as a result, Mr. Godfrey could not control his subconscious impulses and his resulting acts when he shot and killed his wife and mother-in-law.

At the sentencing phase of the trial, the jury fixed Mr. Godfrey's punishment for each of the two murders at death and designated as the aggravating circumstances for each murder "that the offense of murder was outrageously or wantonly vile, horrible and inhuman." This was the only aggravating circumstance submitted to the jury. Georgia Code Ann. § 27-2534.1(b)(7). The two sentences of death were later imposed by the trial judge, who also sentenced Mr. Godfrey to ten years imprisonment for the aggravated assault upon his daughter.

Mr. Godfrey's Motion for a New Trial was denied by the trial court and his convictions and sentences later affirmed by the Georgia Supreme Court, Godfrey v. State, 243 Ga. 302, _____ S.E.2d _____ (1979).

Subsequently, a petition for writ of certiorari was granted by this Court, to determine whether the Georgia Supreme Court had adopted such a broad and vague construction of Georgia Code Ann. § 27-2534.1(b)(7) as to violate the Eighth and Fourteenth Amendments to the Constitution. On May 19, 1980, this Court issued its

opinion and vacated the two death sentences, concluding that the evidence did not support a § 27-2534.1(b)(7) finding. Godfrey v. Georgia, 446 U.S. 420 (1980). The Court then remanded the case to the Georgia Supreme Court for further proceedings not inconsistent with its opinion.

On September 8, 1980, the Georgia Supreme Court further remanded the case to the Superior Court of Polk County for either the imposition of life sentences or a resentencing trial under any aggravating circumstance other than § (b)(7). After remand, the State informed Mr. Godfrey that this time it would seek the death penalty for both murders under Georgia Code Ann. § 27-1534.1(b)(2).

Mr. Godfrey's Motion for Rehearing was denied by the Georgia Supreme Court. A motion to impose a life sentence and plea of former jeopardy were denied by the trial court, as was a motion to enjoin the state from proceeding with a resentencing trial pursuant to Georgia Code Ann. § 27-2534.1(b)(2). A notice of appeal from the denial of the motions was filed on November 3, 1980. The same day, a motion for a continuance was filed, asserting that the filing of a notice of appeal from the denial of the motions deprived the trial court of jurisdiction. That motion also was denied by the trial court.

On November 17, 1980, Mr. Godfrey's resentencing trial commenced. The evidence presented was essentially the same as that presented at the guilt-innocence phase of Mr. Godfrey's first trial. On November 20, 1980, the jury again fixed the punishment as to both murder counts as death, designating as the aggravating circumstance for the murder of Mildred Godfrey, the commission of another capital felony, i.e., the murder of Chessie Wilkerson; and for the murder of Chessie Wilkerson, the commission of another capital felony, i.e., the murder of Mildred Godfrey. The trial court sentenced Mr. Godfrey to death by electrocution

and set the date as December 5, 1980. Notice of appeal was timely filed with the Georgia Supreme Court and a stay of execution was granted.

On appeal the Georgia Supreme Court affirmed the sentence of death for the murder of Chessie Wilkerson, but arbitrarily vacated the sentence of death for the murder of Mildred Godfrey. Godfrey v. State, 248 Ga. 616, _____ S.E.2d _____ (1982).

A petition for a writ of certiorari was denied by this Court on April 5, 1982. Godfrey v. Georgia, 456 U.S. 919 (1982).

The Superior Court of Polk County set September 30, 1982 as the new date of execution. A petition for a writ of habeas corpus, stay of execution, and leave to proceed in forma pauperis was filed with the Superior Court of Butts County on September 27, 1982, and a stay of execution was granted the same day.

A hearing on the petition for a writ of habeas corpus was held on November 9, 1982. On December 23, 1982, the Butts County Superior Court entered an order denying the writ. A timely notice of appeal from the denial was filed with the Georgia Supreme Court. On January 20, 1983, Mr. Godfrey's application for a certificate of probable cause was filed with the Georgia Supreme Court, which issued a certificate of probable cause to appeal on April 11, 1983. The appeal was denied on November 4, 1983. A motion for rehearing was timely filed and denied on November 29, 1983.

This petition for a writ of certiorari was then filed.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

A. Double Jeopardy

On May 19, 1980, this Court filed its opinion in Godfrey v. Georgia, 446 U.S. 420 (1980) and reversed the judgment insofar as it left the death sentences standing and

remanded the case to the Georgia Supreme Court for further proceedings. On September 8, 1980, the Georgia Supreme Court remanded the case to the Superior Court of Polk County for either imposition of life sentences or a resentencing trial under any aggravating circumstance other than Georgia Code Ann. § 27-2534.1(b)(7). Petitioner then filed a motion for rehearing before the Georgia Supreme Court, arguing that double jeopardy would bar any resentencing trial. That motion was denied on September 20, 1980.

Petitioner, then filed a Motion to Impose Life Sentences, and Plea of Former Jeopardy in the trial court. Both these motions were denied and the trial court declined to certify the denial of the motions for immediate review. A motion to enjoin the State from proceeding with a resentencing trial on Georgia Code Ann. § 27-2534.1(b)(2) was filed on October 24, 1980 and denied the same day. A notice of appeal was timely filed on November 3, 1980 and on the same date a motion for continuance was filed in the trial court stating that an appeal to resolve the double jeopardy issue had been filed.

On November 17, 1980 petitioner's resentencing trial commenced and on November 20, 1980 the jury fixed the punishment at death. The trial court sentenced Mr. Godfrey to death and a notice of appeal was timely filed. The Supreme Court of Georgia affirmed the sentence of death for the murder of Chessie Wilkerson while arbitrarily vacating the death sentence for Mildred Godfrey. That court denied the claims of double jeopardy. Godfrey v. State, 248 Ga. 616, _____ S.E.2d _____ (1982).

On April 5, 1982 this Court denied a petition for writ of certiorari on the question and denied the motion for rehearing on May 24, 1982.

On September 27, 1982, a Petition for Writ of Habeas Corpus was filed in state court. A hearing was held on November 9, 1982 before the Superior Court. On December 23, 1982, the court entered an order denying the petition, holding simply that the "allegations concerning double jeopardy were decided adversely to him on direct appeal."

A notice of appeal was timely filed and an application for a certificate of probable cause was filed on January 20, 1983. On Aprl 11, 1983, the court issued a certificate of probable cause. An order denying the appeal was issued on November 4, 1983.

Petitioner has raised the double jeopardy issue at each and every stage enumerated below. A Petition for Certiorari is now filed to resolve this federal question.

B. Jury Selection

Petitioner's trial counsel's motions to strike two veniremen for cause because of their unalterable preference for the death penalty were denied by the trial judge (Resentencing Hearing Transcript at 49-50; 116-118). On direct appeal Petitioner alleged that the trial judge's undue restrictions of counsel's questioning of prospective jurors denied Petitioner the opportunity to fully develop the biases of these and other potential jurors. The Georgia Supreme Court disagreed, finding that counsel's questions were inappropriate and noting that the two prospective jurors had agreed to follow the law as given by the trial judge.

In Sections C and D of his Petition for a Writ of Habeas Corpus Petitioner alleged that the trial judge had unfairly restricted voir dire examination and that the judge had denied Petitioner his right to an impartial jury by refusing to exclude the two veniremen based upon their answers to the questions defense counsel was permitted to ask. The Superior Court agreed with Petitioner that the

questioning of one veniremen had been unduly restricted, but denied Petitioner relief because the error had not affected a substantial number of prospective jurors. On appeal from the denial of the petition for a writ of habeas corpus, Petitioner again raised the issues of unfair restriction of voir dire and the refusal to strike the two veniremen for cause. The Georgia Supreme Court again denied Petitioner's appeal as to these and all other issues, but in dissent Justice Gregory argued for reversal of Petitioner's death sentence because of the failure to strike one venireman for cause. Petitioner's Motion for Rehearing on this issue later was denied by the Court.

C. Petitioner's trial counsel objected to the instruction concerning intent, but that objection was denied by the trial judge. On direct appeal petitioner renewed his challenge to the instruction but the Georgia Supreme Court found all the instructions given by the trial judge were proper.

In Section G of his petition for a writ of habeas corpus petitioner again challenged the intent instruction as impermissibly burden shifting in violation of Sandstrom v. Montana, 442 U.S. 510 (1979). Petitioner also challenged the instruction on malice in the same section of his habeas corpus petition. The Superior Court found both instructions proper, although it acknowledged that a similar intent instruction had been disapproved for further use by the Georgia Supreme Court in the case of Hosch v. State, 246 Ga. 417, 271 S.E.2d 817 (1980). On appeal, the Georgia Supreme Court affirmed the decision of the Superior Court.

ARGUMENT

I.

THE RESENTENCING TRIAL THAT FOLLOWED THE REVERSAL OF PETITIONER'S DEATH SENTENCE WAS IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The Double Jeopardy Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, Benton v. Maryland, 395 U.S. 784 (1968), protects against a second prosecution for the same offense after acquittal or conviction. North Carolina v. Pearce, 395 U.S. 711 (1968).

In the instant case, Petitioner was convicted in the Superior Court of Polk County, Georgia, of two counts of murder and one count of aggravated assault. Subsequently, the jury deliberated on the question of punishment and was asked by both the court and the state's attorney to consider only the aggravating circumstance set forth in Georgia Code Ann. § 27-2534.1(b)(7), in determining whether a sentence of death for each or both of the murders was appropriate. The jury made a finding for death pursuant to that statutory provision. Following a reversal of the two sentences of death by the Supreme Court of the United States, Godfrey v. Georgia, 446 U.S. 420 (1980), Petitioner was re-tried on the question of punishment only. At the resentencing trial, the jury was instructed on Georgia Code Ann. § 27-2534.1(b)(2), which provides for the return of a death sentence when a murder has been committed during the commission of another capital felony. This was a different aggravating circumstance than that charged in the first trial. Pursuant to the resentencing charge the jury returned two sentences of death.

The resentencing trial was barred by the prohibition against double jeopardy because the reversal of Petitioner's death sentences by this Court in Godfrey v. Georgia, supra, was based upon a finding that the evidence presented at Petitioner's trial was insufficient to support a sentence of death under the aggravating circumstance set forth in

437 U.S. 1, 18 (1978); Hudson v. Louisiana, 450 U.S. 40 (1981). Also, by presenting only one aggravating circumstance to the jury at the first trial, the state waived and forfeited its opportunity to prove any other aggravating circumstance. The sentencing retrial was unconstitutional and in violation of Petitioner's due process rights.

In Bullington v. Missouri, 451 U.S. 430 (1981), the Supreme Court held that the protection afforded by the double jeopardy clause was available to a defendant in the sentencing phase of a capital murder trial such as the one held under the Georgia statutory scheme. The Court, in reaching the conclusion in Bullington, relied heavily upon the fact that all of the "hallmarks of a trial on the question of guilt or innocence" were set forth in the Missouri statutory sentencing procedures. 451 U.S. at 439. The same trial-like safeguards that convinced the Court in Bullington to find the double jeopardy bar applicable are contained in the Georgia statutory scheme applicable to capital murder trials: two possible sentences exist for a defendant convicted of murder, death or life imprisonment, Georgia Code Ann. § 26-1101(c); a separate presentence hearing is held before the jury which imposes the verdict of guilty, Georgia Code Ann. § 27-2503(b); additional evidence in mitigation and aggravation may be presented, as well as argument by counsel, Georgia Code Ann. § 27-2503; and a jury's decision to impose death must be unanimous or the defendant receives the alternative sentence of life. Furthermore, the jury must designate in writing the aggravating circumstance(s) upon which it relies. Georgia Code Ann. § 27-2534.1. It is clear that the Georgia statute and procedures for capital sentencing trials provide the same substantive standards and procedural safeguards this Court found determinative in the Missouri statute and, therefore, the double jeopardy clause applies to bar Petitioner's resentencing trial.

The protection of the double jeopardy provision extends to preclude Mr. Godfrey's second trial once the reviewing court found the evidence legally insufficient. Burks v. United States, 437 U.S. 1, 18 (1978), Hudson v. Louisiana, 450 U.S. 40 (1981). Upon reversing Petitioner's death sentence in Godfrey v. Georgia, supra, the Court made it clear that the facts and circumstances found below were insufficient to support the sentence of death pursuant to the charged aggravating circumstance.

This constitutes a finding that an "essential element" was not demonstrated by the government's evidence and a retrial on that same issue is barred. Carter v. Estelle, 691 F.2d 775 (5th Cir. 1982). Applying the Court's holding in Bullington, this bar applies equally to a sentencing trial where the jury is presented with the sentencing options of life or death. Bullard v. Estelle, 665 F.2d 1347 (5th Cir. 1982).

Moreover, retrial is barred where, as here, the "prosecution had the opportunity fully to develop its case . . . at the first trial." Burks v. United States, supra, 437 U.S. at 4; quoting United States v. Bass, 490 F.2d 846, 852-853 (5th Cir. 1974). The State had the opportunity to prove and submit to the jury a death sentence pursuant to the charged subsection (b)(2) prior to the resentencing proceeding. The State's failure to take that opportunity constituted a waiver by the state not to proceed under that subsection at a later time. Further, a new opportunity to prove the existence of a different aggravating circumstance would provide the same sort of repeated attempts that the Supreme Court observed are absent in the ordinary resentencing situation. United States v. DiFrancesco, 449 U.S. 117, 136 (1980).

Additionally, Georgia Code Ann. § 27-2534.1(b) clearly requires the trial judge to evaluate the evidence presented

at the trial and to submit to the jury any of the ten proscribed aggravating circumstances "which may be supported by the evidence." The trial court's decision to submit only subsection (b)(7) to the jury constitutes an implied acquittal of every other aggravating circumstance and the State is barred from a subsequent trial of Petitioner under these other aggravating circumstances. Bullington v. Missouri, supra, 451 U.S. at 446 (1981); Burks v. United States, supra, 437 U.S. at 16 (1978). The double jeopardy provision is designed to ensure that a person need only once run the gauntlet of possible punishments which the state imposes for that conduct. North Carolina v. Pearce, 395 U.S. 711, 727 (Douglas, J. concurring).

The state must be precluded from repeated attempts to seek a sentence of death in violation of Petitioner's rights. This Court has adhered to the view that a heightened degree of judicial scrutiny must apply when the life of the accused is at stake.

This Court should grant certiorari in this case to establish the scope and application of the double jeopardy protection. This case should be held in connection with Arizona v. Rumsey, _____ P.2d _____, (Ariz. No. 5042-2 1983), cert. granted, _____ U.S. _____, 34 CrL 4141 (1984), which was granted certiorari on a similar issue.

II.

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE FAILURE TO EXCLUDE VENIREMEN IRREVOCABLY COMMITTED TO IMPOSITION OF THE DEATH PENALTY VIOLATED PETITIONER'S RIGHT TO AN IMPARTIAL JURY.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant a fair trial by a panel of impartial, indifferent jurors. Irwin v. Dowd, 366 U.S. 717, 722 (1961). Prejudice, bias, or any form of predisposition by the trier of fact constitutes a violation of the defendant's due process rights. Id.; see also, In Re

Murchison, 349 U.S. 133 (1958); Tumey v. Ohio, 273 U.S. 510 (1927).

In the sentencing phase of a death penalty trial, an "unbiased" jury requires that the jurors be able to fully and completely consider a sentence less than death without any preconceived beliefs as to the imposition of a death sentence. In Witherspoon v. Illinois, 391 U.S. 510 (1968), this Court declared that the practice of excluding veniremen for cause in capital cases simply because they expressed general objections to the death penalty or voiced conscientious or religious scruples against its infliction violated the Sixth Amendment, because it resulted in a "jury uncommonly willing to condemn a man to die." Id. at 521. A venireman must "be willing to consider all of the penalties provided by state law and . . . not be irrevocably committed" to a sentence of death, Mr. Justice Stewart declared in his opinion for the Court. Id. at 522 n.21.

Witherspoon's rationale applies with equal force when the trial court refuses to exclude jurors who are committed to a sentence of death. In both situations, the jury that decides the question of punishment is unfairly predisposed to vote for capital punishment, rather than other available sentencing options.

During the voir dire at Petitioner's resentencing trial, the trial judge refused to excuse for cause two veniremen whose answers to defense counsel's questions demonstrated they could not return a sentence less than death. The pertinent portions of the colloquy between defense counsel and venireman C.J. Powell were as follows:

> DEFENSE COUNSEL: Do you feel as a general proposition that the death penalty ought to be imposed for first degree murder?

VENIREMAN POWELL: I think so.

* * * * * *

DEFENSE COUNSEL: Well, assume there's a murder, two murders with aggravating circumstances proved to your satisfaction would you be able to, considering your opinion previously stated, would you be willing or able to consider a sentence less than death under those circumstances and follow the law that allows it?

VENIREMAN POWELL: No, I'd go for the death sentence. (Resentencing Hearing Transcript at 48-49).

Prospective juror Doyle Bright stated, in response to counsel's questions, that he could consider no sentence other than death, that he believed the death penalty was the appropriate punishment for first-degree murder, and that mitigating circumstances would have no effect on his view what the punishment should be. Although he "guessed his mind could be changed", he "didn't think so." (Resentencing Hearing Transcript at 116- 117).

The trial judge's refusal to strike these two veniremen for cause violated the dictates of Witherspoon and also infringed Petitioner's due process rights. Crawford v. Bounds, 395 F.2d 297, 304 (4th Cir. 1968). The law recognizes that "a challenge [for cause] should be sustained to a juror whose testimony 'made it reasonably certain that, in the event of conviction for murder in the first degree, he would render no other verdict than one which required capital punishment.'" Id. at 304.

The fact that these same two veniremen were excused peremptorily by the defense does not affect the constitutional violation. The right of either party to exercise their peremptory challenges in a full, fair and effective manner is well-established. Swain v. Alabama, 380 U.S. 202,

218-220 (1965). The denial or the impairment of the right is reversible error without a showing of prejudice, "for it is, as Blackstone says, an arbitrary and capricious right, and it must be exercised with full freedom, or it fails its full purpose." Id. at 219, citing Lewis v. United States, 146 U.S. 370, 378 (1892). Requiring Petitioner to use his limited number of peremptory challenges on veniremen who should have been excluded for cause deprived him of the use of those challenges against other prospective jurors, thereby denying him a full and effective jury selection process. Bradham v. State, 243 Ga. 638, 256 S.E.2d 331 (1979); Pierce v. State, 604 S.W.2d 185 (Tex. 1980).

A grant of certiorari is called for here as the decision of the Georgia Supreme Court is in conflict with the decisions of other state and federal courts.

This exact issue was considered in Florida, in Thomas v. State, 403 So.2d 371 (Fla. 1981). In a per curiam opinion, the court reversed a murder conviction and ordered a new trial, finding error in the trial court's failure to excuse "for cause" a single juror who stated he could not recommend any mercy in the sentencing phase of the trial. The court found this presence of bias in the juror violated the defendant's Sixth Amendment right to an impartial jury. Id. at 374, citing Stroud v. United States, 251 U.S. 15 (1919) and Crawford v. Bounds, 395 F.2d 297 (4th Cir. 1968).

In Crawford v. Bounds, the United States Court of Appeals for the Fourth Circuit invalidated the murder conviction of a death sentenced defendant because the trial court had refused to exclude a juror who felt it his "duty" to sentence every convicted murderer to death. 395 F.2d at 303-304.

Similarly, in Spinkellink v. Wainwright, 578 F.2d 582, 594 (5th Cir. 1978), the Fifth Circuit declared that a

venireperson must be struck for cause when he indicates that he would recommend the sentence of death in every case of first degree murder.

The decisions of the California Supreme Court also support this result. See Hovey v. State, 168 Cal. Rptr. 128, 616 P.2d 1301, 1310 (1980)(Jurors who would automatically vote for the death penalty must be removed for cause), relying on People v. Hughes, 52 Cal.2d 89, 94-95, 17 Cal. Rptr. 617, 367 P.2d 33, 36 (1961)(Immutably established opinion in favor of invariably selecting the death penalty establishes actual bias supporting a challenge for cause).

The Texas courts, considering the same issue, found constitutional error requiring reversal in three cases where the trial court refused to excuse for cause a single juror who indicated an unwillingness to consider a sentence other than death. Pierce v. State, 604 S.W.2d 185 (Tex. 1980); Cuevas v. State, 575 S.W.2d 543 (Tex. Cr. App. 1978); Smith v. State, 573 S.W.2d 763 (Tex. Cr. App. 1977).

In Cuevas, and Smith, the court held that reversal was required even though the jurors were "rehabilitated" during voir dire, responding finally that they would consider both options or follow the court's instructions of law. The court reasoned that the jurors' responses, taken as a whole, showed an inability to consider the full range of punishment:

> It is too mechanistic to reason that Payne was a qualified juror because he was willing to require the state to prove beyond a reasonable doubt special issues submitted at the punishment stage. The law requires this, and in addition, requires that each juror consider the full range of punishment applicable to the offense in question.

Smith v. State, supra, 573 S.W.2d at 766.

This analysis also was followed by Justice Gregory in his dissent to the opinion by the court below. Godfrey v. Francis, (Dissenting slip op. at 3-4). A court is required to examine the full range of a juror's answers to determine if bias in fact exists. Once a juror has asserted an unwillingness to consider a sentence less than death, the court cannot "rehabilitate" that juror simply by eliciting a response that the juror will consider all the evidence and the law as the court instructs. The Georgia Supreme Court followed this same principle in its decision in Cofield v. State, 247 Ga. 98, 274 S.E.2d 530 (1981), where it held it was not error for the trial court to refuse to allow the defense attorney to attempt to rehabilitate a juror excused on Witherspoon grounds, reasoning:

> It is not sufficient that the juror be willing to consider the death penalty if he or she is committed to automatically vote against the death penalty after having considered it.

274 S.E.2d at 530.

This Court should not permit the Supreme Court of Georgia to apply a different standard to those potential jurors who assert an unwillingness to consider life rather than an unwillingness to consider death.

> To permit a juror whose mind is foreclosed on one side of that issue to serve, while eliminating those who think to the contrary, and to exert special effort to qualify one whose mind may be foreclosed on the issue of guilt while freely excusing those who indicate a predisposition as to punishment, were not the ways to achieve the constitutional objective. Denial of equal treatment in the manner of selection inevitably resulted in denial of due process.

Crawford v. Bounds, 395 F.2d at 297, 304 (4th Cir. 1968) (emphasis added).

Jurors Powell and Bright both indicated an unwillingness to consider a sentence less than death. The trial court's refusal to excuse them for cause would have allowed them to apply on a personal basis the very thing that was condemned by the U.S. Supreme Court in Woodson v. North

Carolina, 428 U.S. 280 (1976) and Roberts v. Louisiana, 428 U.S. 325 (1976): a mandatory death penalty "that accords no significance to relevant facts of the character and record of the individual offender or the circumstances of the particular offense." Woodson v. North Carolina, supra, 428 U.S. at 304.

III.

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE TRIAL COURT'S INSTRUCTIONS REGARDING MALICE AND INTENT WERE IMPERMISSIBLY BURDEN SHIFTING IN VIOLATION OF SANDSTROM V. MONTANA.

In Sandstrom v. Montana, 444 U.S. 510 (1979), this Court struck down as unconstitutional a jury instruction that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." 444 U.S. at 513. The Court found the instruction unconstitutional on two grounds:

> First, a reasonable jury could well have interpreted the presumption as "conclusive," that is, not technically as a presumption at all, but rather as an irrebutable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions (and their "ordinary" consequences), unless the defendant proved the contrary by some quantum of proof which may well have been considerably greater than "some" evidence -- thus effectively shifting the burden of persuasion on the element of intent. 444 U.S. at 517 (emphasis in original).

At petitioner's trial, the trial court instructed the jury, in pertinent part, as to the element of intent:

> The act [sic] of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the tryor [sic] of facts, that is you the jury, may find such intention upon consideration of the

> words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted. Every person is presumed to be of sound mind and discretion but the presumption may be rebutted. (Trial Transcript at 545.)

Defense counsel's objection to this instruction was denied by the trial judge. (Trial Transcript at 552-553).

The trial judge also instructed the jury:

> [A] person commits murder when he unlawfully and with malice aforethought, either expressed or implied, causes the death of another human being. Expressed malice is that deliberate intention to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart. (Trial Transcript at 546.)

Both these instructions impermissibly shifted to petitioner the burden of proof as to essential elements of the crime of first degree murder, in violation of this Court's decision in Sandstrom. Petitioner's jury may well have concluded that petitioner was obligated to prove the absence of intent or of malice. The jury also may have believed it was petitioner's burden to provide some, if not substantial, evidence of his lack of intent or his lack of malice. In either event, the instructions acted unconstitutionally to place the burden of proof of these elements upon petitioner.

The defects were not cured by the inclusion of the phrase "the presumption may be rebutted" at the end and in the middle of the intent instruction, or by the court's other instructions concerning the burden of proof and the presumption of innocence. "The error in giving such a burden-shifting charge will not be absolved because other phrases defining the proper burden of proof are included in the instruction, no matter how often such corrective phrases

are repeated." Chiantese v. United States, 560 F.2d 1244, 1255 (5th Cir. 1977); see also, United States v. Friche, 684 F.2d 1126, 1129 (5th Cir. 1982).

Recently, in Franklin v. Francis, 720 F.2d 1206 (11th Cir. 1983), the United States Court of Appeals for the Eleventh Circuit held that the identical instruction on intent which was given to the jury in this case created a mandatory rebuttable presumption which impermissibly shifted the burden of proof to the defendant on the issue of intent. The court reasoned:

> The presumption on intent in this case allowed the same result as did the presumption in Sandstrom. A reasonable jury could have understood the instruction to mean that the burden to prove "no intent to kill" shifted to the defendant once the State showed sound mind, the act of pointing the gun at . . . [the decedent], and pulling the trigger, of which the natural and probable consequences was . . . [the decedent's] death.
>
> The problem with the charge on intent here is that the jury was never enlightened as to the nature of the burden on . . . [the defendant] to rebut the presumption that he intended the killing. If the jury was persuaded that . . . [the defendant] had to produce more than some evidence that he did not intend to kill, the burden shifted impermissibly on an element essential for a malice murder verdict. Id. at 1211.

The court further concluded that the trial court's additional instructions that intent is not presumed and that the burden is on the State to prove every element of the crime did not cure the faulty instruction. As the court noted, this charge was present in Sandstrom, and was not rhetorically inconsistent with a conclusive or burden-shifting presumption. The jury could have interpreted the two sets of instruction as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied. Id. at 1211-1212, quoting Sandstrom v. Montana, supra, 442 U.S. at 518, n.7.

On appeal from the denial of a writ of habeas corpus in Petitioner's case the Georgia Supreme Court rejected Petitioner's challenges to the intent and malice instructions. The court conceded that it had disapproved of a similar charge in the case of Hosch v. State, 246 Ga. 417; 271 S.E.2d, 817 (1980), but concluded that the intent instruction in Petitioner's case did not impermissibly shift the burden of proof, because the trial court had adequately instructed the jury as to burden of proof, reasonable doubt and intent as a jury question, and had informed the jury that the presumption of intent was rebuttable. Slip op. at 4-5.

The court found the malice instruction constitutional on the basis of its earlier decision in Franklin v. State, 245 Ga. 141; 263 S.E.2d 666 (1980). Slip op. at 5. */

The Court should grant a writ of certiorari to consider the decision of the Georgia Supreme Court. That decision is in conflict with the Eleventh Circuit's decision in Franklin v. Francis, supra, and several other decisions of the Eleventh and Fifth Circuits. Compare Brooks v. Francis, 716 F.2d 780 (11th Cir. 1983)(malice instruction impermissibly burden shifting but harmless error); Mason v. Balkcom, 669 F.2d 222 (Former 5th Cir. 1982), cert. denied, 103 S.Ct. 260 (1983)(malice instruction impermissibly burden shifting); United States v. Friche, 684 F.2d 1126 (5th Cir. 1982), cert. denied, 103 S.Ct. 1250 (malice instruction impermissibly burden shifting but harmless error); Healy v.

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*/ This case was overturned by the Eleventh Circuit in Franklin v. Francis, supra. Because the basis for the reversal was that Court's determination that the jury instruction on intent impermissibly shifted the burden of proof upon the defendant, the Court did not consider whether the malice instruction similarly was unconstitutional. Given the reversal, however, the Georgia Supreme Court's reliance upon Franklin to uphold the malice instruction in Petitioner's case is questionable.

Maggio, 706 F.2d 698 (5th Cir. 1983)(malice instruction impermissibly burden shifting but harmless error).

Further, the decisions of the Eleventh Circuit finding error in the instructions regarding intent or malice are in conflict with other decisions of that Circuit Compare Corn v. Zant, 708 F.2d 549 (11th Cir. 1983)(intent and malice instructions not burden shifting); Hance v. Zant, 696 F.2d 940 (11th Cir. 1983)(intent and malice instructions not burden shifting).

Additionally, this Court should grant the writ of certiorari in order to consider this case along with two other cases in which writs of certiorari have been granted to review alleged Sandstrom errors -- Reed v. Ross, 704 F.2d 705 4th Cir.), cert. granted, _____ U.S. _____, 34 CrL. 4109 (1983); Koehler v. Engle, _____ F.2d _____ (6th Cir.), cert. granted, _____ U.S. _____, 34 CrL. 4033 (1983).

IV.

CONCLUSION

For the reasons stated herein, Robert Franklin Godfrey requests that a writ of certiorari issue to review the decision of the Court below.

Respectfully submitted,

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APPENDIX A

In the Supreme Court of Georgia

Decided: Nov. 4, 1983

39843. GODFREY v. FRANCIS

SMITH, Justice.

This is a habeas corpus case. Robert Franklin Godfrey shot and killed his wife and mother-in-law and struck his daughter with the same shotgun. He was convicted of murder and aggravated assault and received two sentences of death. We affirmed in Godfrey v. State, 243 Ga. 302 (253 SE2d 710) (1979). The two death sentences were subsequently vacated by the United States Supreme Court. Godfrey v. Georgia, 446 U.S. 420 (100 SC 1759, 64 LE2d 398) (1980). On remand, this court directed that the case be sent back to the trial court for either imposition of a life sentence or for a resentencing trial. Godfrey v. State, 246 Ga. 359 (274 SE2d 339) (1980). A second sentencing trial was held in Polk County Superior Court and Godfrey was again sentenced to death. On direct appeal, we concluded that the two statutory aggravating circumstances, the murders of the two women, were mutually supporting, vacated the death penalty for the murder of his wife Mildred Godfrey, and affirmed the sentence of death for the murder of Chessie Wilkerson, his mother-in-law. Godfrey v. State, 248 Ga. 616 (284 SE2d 422) (1981). Godfrey then filed for a writ of habeas corpus, which was denied. We subsequently granted his application for probable cause to appeal. We affirm. A detailed statement of the facts in this case may be found at Godfrey v. State, 243 Ga. 302 (253 SEd 710) (1979).

1. In his first enumeration Godfrey contends that he did not receive effective assistance of counsel, in that no challenge to the traverse jury pool was filed and the

challenge to the composition of the grand jury was not timely filed. The habeas court found as a fact that prior to Godfrey's first trial, counsel filed numerous motions and that among them was a challenge to the composition of the grand jury. This motion was dismissed as untimely because Godfrey had already been indicted. This dismissal was upheld on direct appeal. Godfrey v. State, 243 Ga. 302, 305.

It was the rule in Georgia at the time of Godfrey's indictment that a challenge to composition of the grand jury must be filed prior to the return of the indictment or it will be deemed waived.[1] Sanders v. State, 235 Ga. 425 (219 SE2d 768 (1975), cert. denied, 425 U.S. 976 (96 SC 2177, 48 LE2d 800) (1975). A challenge cannot be asserted as a ground for writ of habeas corpus, unless it is shown in the petition that cause exists for being allowed to pursue the objection to the grand jury's composition after the conviction and sentence have otherwise become final. OCGA § 9-14-42(b). Under federal law a showing of actual prejudice is required, as well as a showing of cause, to allow the untimely challenge. Francis v. Henderson, 425 U.S. 536 (96 SC 1708, 48 LE2d 149) (1976); Lumpkin v. Ricketts, 551 F2d 680 (5th Cir. 1977). Where no cause is shown, mere allegation that a jury challenge was not timely filed will not support a claim of ineffective assistance of counsel. Zant v. Gaddis, 247 Ga. 717(3) (279 SE2d 219) (1981).

Godfrey submits evidence to support this enumeration in the form of an affidavit containing unanalyzed data as to composition of the grand jury array. This data on its face neither confirms nor contravenes his contention. He asserts that he has thus established cause in that it is likely that his timely motion challenging the composition of the grand jury would have succeeded. However, he has not shown cause as contemplated by the statute and the cases interpreting it and Godfrey cites no authority in support of his contention.

Therefore we find that Godfrey has not shown cause why he should be allowed to proceed with an untimely challenge to the composition of the grand jury.

As to the traverse jury question, Godfrey's counsel testified that he considered a challenge but he believed that it would be dismissed and thus unsuccessful. Appellant has not presented any evidence to support a contrary conclusion and merely alleges that the traverse jurors were selected by a discriminatory system which disproportionately excluded blacks, women and persons aged 18 to 30. The habeas court found that counsel's failure to file a challenge to the traverse jury was a tactical decision. We cannot find that this was a clearly erroneous result. Hawes v. State, 240 Ga. 327, 329 (240 SE2d 833) (1977). Neither defense counsel's failure to timely challenge the composition of the grand jury nor his tactical decision not to challenge the traverse jury array resulted in denial of Godfrey's Sixth and Fourteenth Amendment right to effective assistance of counsel. Hudson v. State, 250 Ga. 479(8) (299 SE2d 531) (1982). We find no merit in this enumeration.

2. Godfrey enumerates as error issues raised and reviewed by this court on direct appeal in his enumerations numbered 2, 4-8, 11, 16, 18, 20, and 21. These issues will not be considered again on this appeal from denial of a petition for a writ of habeas corpus. Zant v. Campbell, 245 Ga. 368 (265 SE2d 22) (1980), cert. denied, 449 U.S. 891 (101 SC 252, 66 LE2d 118) (1981).

3. In his third enumeration Godfrey asserts that the trial court's charges to the jury concerning the elements of intent and malice impermissibly shifted the burden of proof to him, contrary to the rule established in Sandstrom v. Montana, 442 U.S. 510 (99 SC 2450, 61 LE2d 39) (1979). At Godfrey's trial on the issue of guilt, the court instructed the jury: "the acts of a person of sound mind and discre-

tion are presumed to be the product of a person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted." Godfrey contends that the instruction was unconstitutional because it permitted the jurors to conclude that they could find the requisite element of intent unless appellant provided more than some evidence to the contrary, thereby shifting the burden of proof of this element to appellant.

In Hosch v. State, 246 Ga. 417 (271 SE2d 817) (1980), decided after Godfrey's trial and conviction, we examined a similar although not identical charge: "I charge you that the law presumes that a person intends to accomplish the natural and probable consequences of his acts, and if a person uses a deadly weapon or instrumentality in the manner in which such weapon or instrumentality is ordinarily used and thereby causes the death of a human being, the law presumes the intent to kill. These presumptions may be rebutted." Id. at 419. We found that although this charge was not error, we disapproved its continued use. "Absent explanatory language the charge should not be cast in terms of the 'the law presumes,' a phrase which, standing alone, as the U.S. Supreme Court has pointed out in Sandstrom, supra, is subject to misinterpretation by the jury." Id. at 420. Our approved charge on intent substitutes "you may infer," for language stating a presumption. However, as we said in Hosch, no conclusive presumption is charged when the jury is also adequately instructed that the presumption may be rebutted. See OCGA § 16-2-5; Wilson v. Zant, 249 Ga. 373 (290 SE2d 442) (1983). In view of the trial court's charges on the presumption of innocence, the burden of proof, reasonable doubt, and intent as a jury question, we find that the jury could not have interpreted the charge as shifting the burden of persuasion to Godfrey. Johnson v. State, 249

Ga. 621(1) (292 SE2d 696) (1982). Where, as here, instruction on rebuttal is incorporated into the charge, the burden of persuasion on the element of intent is not shifted to the accused in violation of the Fourteenth Amendment's due process requirement that the state prove every element of a crime beyond a reasonable doubt.

As to malice, the trial court charged: "Express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart." Godfrey contends that this instruction violates due process, in that the jury may have concluded that the implication of malice was mandatory or that Godfrey had to prove lack of malice. We have previously examined and approved this charge. See Franklin v. State, 245 Ga. 141(9) (263 SE2d 666) (1980).

4. In his ninth enumeration, Godfrey contends that the trial court failed to timely determine his status as an indigent and thus violated his right to due process of law and effective assistance of counsel. Godfrey was arrested on September 21, 1977. Counsel was appointed the next day, pending a detemination of his indigency, which was resolved on December 22, 1977. He was tried begining March 6, 1978. Godfrey was represented by counsel from the day after his arrest and throughout the period leading up to and including his trial. There is no merit in this enumeration.

5. In his tenth enumeration, Godfrey complains that the compelled pretrial psychiatric and psychological examinations conducted without presence of counsel violated his right against self-incrimination protected under the Fifth and Fourteenth Amendments and his right to counsel under the Sixth Amendment, citing Estelle v. Smith, 451 U.S. 454 (101 SC 1866, 68 LE2d 359) (1981). He also contends that he was

entitled to, but was not given, a separate Miranda warning prior to the psychiatric interview.

Prior to Godfrey's first trial, counsel filed a motion for a private psychiatric examination at government expense or, alternatively, for government transportation for a private examination at Godfrey's expense. The motion in the alternative was granted and the state requested an examination at a state facility following the private exam. However, the order was written to allow Godfrey to be examined at whichever facility could first see him in order to minimize delay. The state facility had an opening the following day and Godfrey was transported there before notification was sent to counsel that he was on his way. At the state facility he was reminded that he need not answer any questions, but he agreed to be examined and the interview proceeded. Godfrey was later examined by a private psychiatrist and testimony as to both examinations was presented at trial. Now Godfrey claims that the state examination was conducted without adequate safeguard of his right against self-incrimination.

The habeas corpus court found Estelle to be inapposite and we agree. Estelle involved a defendant who did not raise the issue of sanity or otherwise introduce psychiatric evidence. Here, Godfrey moved to obtain a private examination and the state examined him only to be in position to rebut, should Godfrey later choose, as he did, to present testimony concerning his private examination. Thus it was Godfrey who initiated inquiries into his mental condition and proposed psychiatric evaluation. Estelle does not address this issue and does not preclude an examination by the state where the defendant has clearly demonstrated his intent to introduce psychiatric evidence. The Estelle opinion carefully distinguishes such cases: "Nor was the interview analogous to a sanity examination occasioned by a defendant's plea of not guilty by reason of insanity at the

time of his offense. When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist. [citations omitted]."

Nor did Godfrey have a constitutional right to the presence of counsel during the state's psychiatric examination. He asserts no compelling reason for counsel's presence, and we have never ruled that counsel must be present during psychiatric evaluation ordered by a trial court. See Strickland v. State, 247 Ga. 219 (275 SE2d 29) (1981); Presnell v. State, 241 Ga. 49 (243 SE2d 496) (1977). It has been observed that an attorney present during a psychiatric interview could contribute little and might seriously disrupt the examination . See Estelle v. Smith, supra, at n.14. Godfrey was given a full and proper Miranda warning at the time of his arrest, but it was not necessary to remind him (although the state did so) that he need not answer any of the interviewer's questions before the state psychiatric examination. A full, separate, second warning was not necesary. Anglin v. State, 244 Ga. 1 (257 SE2d 513) (1979).

6. In his twelfth enumeration Godfrey contends that it was error to allow into evidence his post-arrest statements to police. He says that these statements were made without benefit of Miranda warnings, and without a "voluntary waiver," in that he presented testimony of his psychotic conditon at the time of the murders. We take this to mean that he intends that the statements made after he had been arrested and advised of his Miranda rights should have been suppressed because he was incapable of voluntarily waiving

his rights to remain silent and to presence of counsel and could not have done so because of an alleged psychotic "dissociative state," to which an expert testified in Godfrey's behalf. The specific statements objected to are not included in the appellant's brief and no reference or citation is made to the record.

Godfrey made several statements to police shortly after the murders. The first occurred when he called the county jail at about 8:30 p.m. on September 9, 1977. He talked to an official there who testified that Godfrey said he had just killed his wife and mother-in-law. He asked that the sheriff be notified and sent out to get him. He spoke plainly, gave his telephone number and offered detailed directions to his location. At about 8:35 p.m. two officers arrived on the scene. One testified that Godfrey was sitting beside a tree about fifty yards from the trailer where he lived. As the officer approached, Godfrey greeted him by name and said, "There's no need of going into the trailer. They're dead. I killed them." He pointed out the murder weapon, a shotgun, where he had placed it in the fork of a nearby apple tree. After the other officer searched the house trailer and discovered the victims, Godfrey was placed under arrest and advised of his Miranda rights. He was placed in a county police car and at the time appeared to be calm and composed, according to the arresting officer.

At the police station Godfrey asked for and received a cup of coffee. While he drank it he spoke to another policeman by name and said, according to testimony, "Mack, I've done a hideous crime, but I've been thinking about it for eight years. I'd do it again." Godfrey does not contend that this statement was the result of any questioning, interrogation, or suggestion by the police, or that the totality of the circumstances and context of his custody might have overborn his will. At no time pertinent to this enumeration did Godfrey invoke any of the Miranda rights.

At the county jail he was observed upon arrival at about 10:30 p.m. by the jailer, who testified that Godfrey appeared to be in control of his faculties and "quite calm."

Introduction of these statements was not objected to at trial and no Jackson-Denno, 378 U.S. 368 (84 SC 1774, 12 LE2d 908) (1964), hearing was held to determine their voluntariness. Our review of the record shows that none of the statements recounted above were made in violation of the rights specified by Miranda. Godfrey made several incriminating statements at or near the time of his arrest that were properly admitted into evidence. There is no question of waiver in the statements made in his telephone call or to officers as they arrived on the crime scene, since Godfrey made these statements before a Miranda warning could be given. The statement at the police station was not a response to interrogation and there is no question but that it was freely and voluntarily made. See Rhode Island v. Innis, 446 U.S. 291 (100 SC 1682, 64 LE2d 297) (1980). There is no merit in this enumeration.

7. In enumeration thirteen, Godfrey asserts that he was denied a fair trial because the court "assigned the task of swearing the jury to the prosecutor; admitted improper testimony in connection with the government's rebuttal to the insanity defense; allowed the introduction into evidence of gory color photographs of the crime scene and the bodies as well as graphic testimony concerning the mutilation of the bodies; admitted a statement of Godfrey in violation of his Miranda rights; allowed the prosecutor to pose improper hypotheticals . . .; allowed the testimony of prior bad acts by Godfrey; and refused to give the jury an instruction on manslaughter, Sansone v. United States, 380 U.S. 343 (1965). Furthermore, the prosecutor's closing remarks consisted of a series of improper and prejudicial remarks. United States v. Garza, 608 F2d 659 (5th Cir. 1979)." This is the substance of the enumeration. There are no citations to the

record and no argument follows in support of the allegations of error.

The statute requiring the trial judge to administer the oath to jurors became effective July 1, 1979, over a year after Godfrey's trial in March 1978. See Ga.L. 1979, p. 1048; OCGA § 15-12-132. The question of evidence of Godfrey's psychiatric condition is taken up in section five of this opinion, supra. The photographs of the victims were admissible under a long standing rule in this state. See Ellis v. State, 248 Ga. 414 (283 SE2d 870) (1981); Johnson v. State, 239 Ga. 324 (236 SE2d 661) (1977). Godfrey's statement to a police officer at the station is reviewed in enumeration six, supra. The hypotheticals posed by the prosecutor were not improper, in that the facts assumed in the hypotheticals were consistent with testimony already in evidence. Yarbrough v. Yarbrough, 202 Ga. 391, 404 (43 SE2d 329) (1947). The bad acts complained of were threats made toward the victims, evidence of which is admissible, as it was used here, to show identity, purpose, and intent. Shafer v. State, 191 Ga. 722(1) (13 SE2d 798) (1941). The clause in the enumeration regarding a charge on manslaughter is so vague and ill-defined that we cannot respond to it, except to say that the evidence did not warrant such a charge. Murray v. State, 214 Ga. 350 (104 SE2d 905) (1958). Finally, the petitioner provides no examples of the closing argument complained of and thus no evidence from which a determination might be made of the detrimental effect of these remarks. For these reasons we find no merit in this enumeration.

8. In his fourteenth enumeration Godfrey asserts that the resentencing trial was conducted in such a way that the jury was not able to make an informed decision, free from emotion and passion, based upon the free flow of evidence, and that as a result he was denied a fair trial. He bases this enumeration on his contentions that: the state intro-

duced evidence "not relevant to the particular aggravating circumstance before the jury," inflammatory closing remarks by the prosecutor which appealed only to the passion of the jury; the court limited mitigation evidence offered by Godfrey; the court permitted testimony by a state psychiatrist who had examined Godfrey, excluded testimony of a member of the Georgia American Civil Liberties Union, and admitted into evidence Godfrey's statement to one of the arresting police officers. None of these contentions are supported by argument, citations to pertinent authority, or citations to the record.

The aggravating circumstance contended by the state to exist in this case and charged by the resentencing court was that "the offense of murder was committed while the offender was engaged in the commission of another capital felony, namely murder." The jury, in response to this charge and the evidence, found that the murder was committed while Godfrey was engaged in the commission of another capital felony. See OCGA § 17-10-30(b)(2)and §17-10-31.

From the memorandum of law submitted to the superior court in support of Godfrey's petition for a writ of habeas corpus it appears that this is the "particular aggravating circumstance" alluded to in Godfrey's brief to this court. His memorandum argues on this point that testimony of the state psychiatrist who examined Godfrey was irrelevant to any statutory aggravating circumstance. The psychiatrist, according to the record before us, testified in rebuttal to a defense witness who had previously testified as to Godfrey's mental condition. Moreover, we have not limited evidence of aggravating circumstances to only the statutory aggravating circumstance. OCGA §§ 17-10-2, 17-10-30(b); Zant v. Stephens, 250 Ga. 97 (297 SE2d 2) (1982); Fair v. State, 245 Ga. 868(4) (268 SE2d 316) (1980). At the resentencing trial there was no objection on the ground named here, and we find no error in permitting this

testimony. In a separate section of the same memorandum Godfrey also contends that "gory" photographs and "graphic" description of the crime scene were irrelevant and should have been excluded. There was no objection during the resentencing trial on these grounds to testimony as to the crime scene. We see no reason to rule other than we did when this question was originally before us on direct appeal. See Godfrey v. State, 243 Ga. 302(2). There is no error here.

The alleged inflammatory closing remarks of the prosecutor of which appellant complains are not set out in the brief or otherwise identified. We are at a loss to determine in which portions of the prosecutor's closing argument appellant grounds his enumeration of error. Our review shows that the prosecutor reviewed the evidence and reiterated the state's appeal for the death penalty. He did not express his own opinion nor did he appeal to the fears and emotions of the jury. A dramatic appeal to legitimate emotional feelings is not constitutionally intolerable, and no more than that occurred here. See Conner v. State, 251 Ga. 113(5) (303 SE2d 266) (1983).

As to the question of mitigating evidence, Godfrey's memorandum appears to argue that Gregg v. Georgia, 428 U.S. 153 (96 SC 2909, 49 LE2d 859) (1976) and Lockett v. Ohio, 438 U.S. 586 (98 SC 2954, 57 LE2d 973) (1978) stand for the proposition that a penalty phase jury is entitled to hear any and all evidence which the defendant might submit as mitigating. This is an incorrect reading of Gregg and Lockett and neither case suggests such a vague and general standard. In Lockett a plurality concluded that the sentencer in death cases should not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and circumstances of the offense that the defendant proffers as a basis for a sentence of less than death. It noted in the same place, however, that

nothing in the opinion limited the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense. Id. at 604. Godfrey's memorandum submits that it was error to exclude evidence of Godfrey's sale of his home subsequent to the murders and disbursement of the funds to his children, on the ground that these facts were relevant to Godfrey's character. We disagree and are not persuaded that it was error to exclude this evidence.

The issue of the admissibility of the testimony by the state psychiatrist who examined Godfrey is reviewed in section 5 of this opinion, supra. The testimony by a representative of the ACLU as to the frequency of death sentences in domestic murder cases was offered at the resentencing trial by Godfrey as relevant to the circumstances of the offense, one of the categories of mitigating evidence recognized in Lockett. However, it is this court, not the judge or jury, that is charged with the responsibility of conducting proportionality review. Wilson v. State, 250 Ga. 630(12) (300 SE2d 640) (1983); Blake v. State, 239 Ga. 292 (236 SE2d 637) (1977). The resentencing court ruled that the evidence was irrelevant. We agree. There was no error of constitutional dimension in this ruling. The issue of whether Godfrey's in-custody statements to police were properly admitted is addressed in section six of this opinion, supra.

Godfrey presents neither evidence nor argument that the resentencing court abused its discretion in making any of the rulings complained of in this enumeration. His assertions amount to no more than a listing of disagreements with the court's rulings. There was no error in any of these rulings.

9. In his fifteenth enumeration, Godfrey finds error in the first trial court's refusal to excuse for cause during voir dire two jurors uncertain about whether they would

accept the defense of insanity. Neither expressed any bias or prejudice against the defendant, but one said she had "qualms" about returning a verdict of not guilty by reason of insanity. The other juror said he was simply unsure of how he would vote. In Butler v. State, 231 Ga. 276 (201 SE2d 448) (1973), we examined an analogous factual question and decided that where a juror has no bias or prejudice against the accused, nor any fixed opinion as to the guilt of the accused which would not yield to the evidence and the instruction of the court, there is no abuse of discretion in holding the juror competent.

Conduct of voir dire is within the discretion of the trial court and the court's rulings are presumed proper in the absence of some manifest abuse of discretion. Patterson v. State, 239 Ga. 409 (238 SE2d 2) (1977). We find no abuse of discretion here and this enumeration is without merit.

10. In his seventeenth enumeration, Godfrey charges error in the exclusion from the venire at the guilt-innocence phase of his trial of a person conscientiously opposed to the death penalty. During voir dire, a prospective juror was excused for cause when he stated that he would refuse to consider capital punishment regardless of the facts of the case, and that he could not, under any circumstances, vote to sentence an accused to death.

Godfrey asserts that excluding this juror was error, citing Witherspoon v. Illinois, 391 U.S. 510 (88 SC 1770, 20 LE2d 776) (1968). Witherspoon established that a juror may be excused for cause where he makes it clear that he would automatically vote against a sentence of death without regard to any evidence that might be developed at the trial of the case before him. The juror in the present case was sufficiently clear in his attitude toward the death penalty to meet the test set out in Witherspoon. High v. Zant, 250 Ga. 693(3) (300 SE2d 654) (1983). There was no error and the juror was properly dismissed.

12. In his nineteenth enumeration Godfrey claims that he was denied his right to a fair and impartial jury at his resentencing trial when the court refused to excuse for cause two jurors who indicated their unwillingness to return a sentence of less than death in a case of murder with aggravating circumstances. The habeas corpus court found that the resentencing court committed harmless error in refusing to allow the first juror to answer certain questions as to his views on the death penalty and that the second juror did not state his firm belief in the death penalty for all persons convicted of murder and so it was not error to fail to excuse him for cause.

This enumeration presents the opposite side of the issue treated in Witherspoon v. Illinois, supra. In Witherspoon the U.S. Supreme Court ruled that the Sixth and Fourteenth Amendments prohibit carrying out a death sentence returned by a jury where the voir dire transcript indicates that the sentencing jury was chosen by excluding jurors for cause simply because they voiced general objections to capital punishment or expressed "conscientious scruples" or religious convictions against its infliction. Id. at 514. In the present case, Godfrey contends that two potential jurors ought to have been dismissed for cause because of their expressed preference for the death penalty in a case involving murder with aggravating circumstances. Both jurors were later peremptorily struck by the defense, which exhausted its strikes.

Two jurors questioned prior to the juror whose voir dire is discussed here were asked respectively, "If the death penalty is provided for by statute as an option do you agree or disagree with that as an option in a murder case?", and "How do you feel about sitting on a jury in a death penalty case?" The court intervened and did not require an answer of either juror. Voir dire of the next juror subjected him to a lengthy debate involving counsel for the defense, the

prosecutor, and the court over the broad and general form of defense counsel's questions. In order to best respond to Godfrey's assertion of error concerning this juror and the court's refusal to dismiss him for cause, pertinent parts of this exchange are set out here.

> Mr. Holmes [for the defendant]: In this case, as has been said, there won't be any deliberation really about guilty or innocent that's already been done, and the case is here for a sentencing to determine whether it's a life sentence or a death sentence. Do you feel that as a general proposition the death sentence is appropriate for first degree murder?
>
> Mr. Foster [for the state]: I'd like to object to that question.
>
> The Court: I'm not going to require him to answer that. I think it's appropriate for me to instruct the jury. Prospective jurors, and I'll ask all of you to listen to this, all jurors. I will give you the instructions pertaining to the determination of whether or not a life sentence or death penalty will be recommended by the jury. You determine your recommendation and the court will pass the sentence. At the conclusion of the trial you will be charged in accordance with the principles which determine how you recommend, either life imprisonment or the death penalty, as follows. Under the laws of this state every person found guilty of murder shall be punished by death or by imprisonment for life. In all cases for which the death penalty may be authorized the law provides that the judge shall instruct the jury concerning mitigating

circumstances or aggravating circumstances which the jury may consider in making the decision which will determine the punishment to be imposed for each offense. Mitigating circumstances are those which do not constitue justification or excuse for the offense in question but which in fairness and in mercy may be considered as extenuating or reducing the degree of moral culpability. Aggravating circumstances are those which increase the guilt or enormity of the offense, or add to its injurious consequences. The law provides that when a person is convicted of an offense that may be punished by death the sentence of death shall not be imposed unless the jury verdict includes a finding beyond a reasonable doubt of at least one statutory aggravating circumstance and a recommendation that the death sentence be imposed.

In arriving at your verdict in this case you would consider the evidence as to the mitigating circumstances which the defendant would contend exists in the case or any other mitigating circumstances you find from the evidence. You would also consider the evidence as to any statutory aggravated circumstances which the State contends exists in the case. If you find beyond a reasonable doubt that the State has proved the existence in this case of either one or more aggravated circumstances as contended by the State and as given you in charge by the court then you would be authorized to recommend the imposition of a sentence of death but you would not be required to do so. If you recommend

the imposition of the sentence of death the court will sentence the defendant to death. If you should find beyond a reasonable doubt that the State has proved the existence in this case of one or more aggravating circumstances contended by the State and given you in charge by the court you would also be authorized to fix the punishment of the defendant at life imprisonment. This recommendation you may make for any reason that is satisfactory to you. If you do not find beyond a reasonable doubt that the State has proved the existence of any of the statutory aggravating circumstances, which the court will charge you, you would not be authorized to consider the penalty of death but fix the punishment at life imprisonment.

Now, those are the instructions and the method of your determining whether or not, or in what manner, you would fix the punishment in this case.

Now, in line with that I'll allow you to test in anything that would show their partiality or impartiality which would prevent them from following those instuctions as jurors.

Mr. Holmes: Mr. Powell, you no doubt listened to the court's charge, what would be the foundation for the court's charge in a case of this nature. Clearly death is a sentence that is an option in a murder case where aggravating circumstances have been found. Do you feel that murder, first degree murder, itself is enough of an aggravating circumstance to in general impose a death

The Court: I'm not going to require him to answer that question. It is directly contrary to my instructions to them. I am going to assume that they will follow the instructions of the court both now and if they are selected as jurors.

Mr. Holmes: Your Honor, we always assume that jurors, if selected, will follow the instructions of the court. But until they are selected I think as far as their personal opinions that may demonstrate bias we're entitled to go into a death sentence case rather than asking "would you follow the standard instructions, yes or no." I think we're entitled to go into the matter. I'm not trying to escape the trial or to delay the trial unnecessarily but I am convinced that that is a matter of the opinions of jurors that may or may not show partiality under the circumstances that must be inquired into rather than to ask a simple yes or no question "will you follow those instructions." That tells me nothing about their . . .

The Court: . . . Ask your question and I'll rule on it.

Mr. Holmes: Mr. Powell, if I can begin again. You've heard the court's instructions but I want to ask you something about your personal feelings in the matter. Do you feel that in general the death sentence is an appropriate sentence for a first degree murder?

Mr. Foster: Your Honor, I object . . .

The Court: . . . Well, that's too broad.

I will not require the juror to answer that question.

Mr. Holmes: Mr. Powell, if you sat in a jury and there was . . . just assume that there was evidence showing first degree murder and that there was evidence showing an aggravating circumstance. Do you feel personally that as a general matter that the death penalty would be an appropriate sentence?

The Court: I wouldn't require the juror to answer that question. It is asking him to pre judge and I am ruling that it cannot be asked.

Mr. Holmes: Your Honor, I'm not asking anybody to pre judge . . .

The Court: . . . Ask another question. I've just ruled on that.

Mr. Holmes: I know the court has ruled on it but I suppose the court wants me to simply ask if they will follow all the instructions and be fair and impartial jurors, yes or no.

The Court: If you need to elicit something that would determine the partiality of the juror or anything that would pertain to his qualifications to serve as a juror I will certainly allow those questions. I am holding that that particular question does not do that and is improper.

Mr. Holmes: Mr. Powell, let me ask you another way. Are there any circumstances under which, assuming hypothetically not just this defendant but in general, assuming someone has been convicted of murder and that there are aggravating circumstances present in

the evidence are there any circumstances under which you would not find that death was the appropriate sentence?

Mr. Foster: Your Honor, I object to that question, it's just stated another way and is too broad and too general for the juror to answer as well as asking him to pre judge the case.

Mr. Holmes: Your Honor, I think people have opinions about these things and that we're entitled to ask some, you know . . .

The Court . . . I think what you're doing is asking him if he would not follow the instructions of the court, if there are circumstances under which he would not follow the instructions of the court.

Mr. Holmes: That's another way of putting it. I think we're entitled to know that.

The Court: That's the way I'm putting it. I hold that the question is improper.

Mr. Holmes: Mr. Powell, you say that you are not conscientiously opposed to capital punishment. I believe you responded to that by answering the court's general question. Do you have strong feelings about the necessity for the imposition of the death sentence as a general rule? Is the death penalty something that you think ought to be imposed more frequently in society that it is today?

The Court: I would not require him to answer that question.

Mr. Holmes: Your Honor, I fail to understand how in a death penalty case where a life is at stake how someone's opinion

regarding the death penalty is not relevant. It's relevant for the State to ask if somebody is so opposed to it that they could not vote it under any circumstances. I think the other side of the coin is an appropriate line of questioning. I can't tell anythng about their opinions without asking them.

The Court: Qualification questions of course are not those asked by the State or those required by law and to qualify the jurors basically they must not be unalterably opposed to capital punishment in order to serve. That is mainly the foundation for their being considered as jurors. It would not open up the whole panorama of letting them philosophize in capital punishment and that is not something that I can allow.

Mr. Holmes: Your Honor, we're seeking to ask a more narrow question than that.

The Court: Let me hear it.

Mr. Holmes: This is not a question of philosophy. It shows partiality. If a man or woman feels that the death sentence ought to be imposed for murder . . .

The Court: . . You're asking if he thinks it ought to always be allowed. I'll allow that. That's somewhat asking him if he would contravene the directions of the court but go ahead and ask him that.

Mr. Holmes: What I'm trying to ask, Mr. Powell, I of course am not picking on you and this is something I'd rather not be doing. Honestly I had rather not be doing this.

The Court: You don't have to apologize for asking questions. We don't . . . the

jurors are directed under their duty to answer the questions properly and you don't have to apologize for asking the questions.

Mr. Holmes: Do you feel as a general proposition that the death penalty ought to be imposed for first degree murder?

Juror: I think so.

Mr. Holmes: Are there any circumstances about the case or that may be in the law as the court gives you in charge that, in a particular case, that would cause you to be willing to consider the grant of mercy or the life sentence even though it is first degree murder with aggravating circumstances?

The Court: I wouldn't require him to answer that. You're asking him to pre judge the factual situation that he does not know about. You're asking if there are any circumstances under which he would recommend life sentence?

Mr. Holmes: Assuming it was a murder with aggravating circumstances, that he would consider a life sentence even though those factors were present.

The Court: I have just given them the instructions that they could do that. I am holding that I expect the jurors, unless they tell me otherwise, that they will follow the instructions of the court. If they can't follow that instruction I will ask them to let me know now. I'm certainly assuming they can all follow the instructions unless they tell me they can't now.

Mr. Holmes: Mr. Powell, if I can, I think, rephrase what the court is saying. The

court has . . .

The Court: . . . Just ask another question. You don't have to rephrase what I said.

Mr. Holmes: Well, assume there's a murder, two murders with aggravating circumstances proved to your satisfaction would you be able to, considering your opinion previously stated, would you be willing or able to consider a sentence less than death under those circumstances and follow the law that allows it?

Juror: No, I'd go for the death sentence.

Mr. Holmes: The death sentence?

Juror: Yes sir.

Mr. Holmes: I would ask that Mr. Powell be excused Your Honor.

The Court: I would overrule your request. He doesn't know the evidence which is to be produced and that is why the question is basically improper. He is not supposed to have to analyze what the evidence is or might be.

Viewing the voir dire of this juror as a whole and considering the context in which the contested answers were given, it was not error for the resentencing court to fail to dismiss the juror. See Hance v. State, 245 Ga. 856(6) (268 SE2d 339) (1980). The extended, persistent, and confusing questions asked the prospective juror failed to elicit a clear, adamant expression of a fixed opinion that would be unyielding in spite of law or evidence which required a contrary finding.[2] The defendant cannot create error by eliciting responses to questions that solicit the juror's views on evidence not yet presented and the law to

be applied in the case at hand. The juror never stated that he would refuse to apply the law as charged or that he would not follow the court's instructions in considering all the evidence. Later, during voir dire of a subsequent juror, the court reminded the entire panel of the charge given the previous day as to consideration of aggravating circumstances in setting a sentence for murder. The judge then said: "Also you should consider any mitigating circumstances in determining whether or not you recommend a life sentence. You can and should consider the life sentence in any event based on the evidence. I would ask all of you if you have any pre-judgment that you could not follow those instructions if you're selected as a juror." None of the jurors responded and questioning continued.

A review of the entire voir dire examination does not show this juror to be so biased or irrevocably committed to the death penalty that he would ignore the court's instructions pertaining to the jury's sentence recommendation and impose the death penalty under all circumstances in which a murder conviction would be returned. See Berryhill v. State, 249 Ga. 442(4)(291 SE2d 685) (1982). Contrary to the finding of the habeas court we find no error here.

The transcript of the voir dire of the second juror shows that he stated that although he believed death to be the appropriate penalty for a murder committed with aggravating circumstances, he also acknowledged that his mind could be changed.

> Mr. Holmes [for the defense]: In other words if there's a conviction, which there is . . . I'm asking you a hypothetical question because we can't go into the facts of this case but if there's a conviction and aggravating circumstances involved present and proved to your satisfaction you would be unable to consider any sentence other than the

death sentence?

Juror: I think possibly not. I guess my mind could be changed but I don't think so.

Mr. Holmes: You think that as a general proposition the death penalty is appropriate punishment for that crime?

Juror: For first degree murder, yes. I think a person is responsible for their actions regardless of the conditions or whatever.

Mr. Holmes: Your Honor, I would ask that Mr. Bright be excused. I think that he has been very honest with us and his statement is about as clearly as he can state that he would not consider . . .

The Court: . . . Well, he didn't say he wouldn't consider it he said he thought . . . he indicated it would be more appropriate. I think as we go through this legal proposition again it would be helpful for me to charge this panel concerning the substance of what I gave all the jurors yesterday. Did all of you hear the charge which I gave yesterday directed to all of you and also the panel in the box?

(All jurors respond with a yes sir)

The Court: At the time that you heard the charge did any of you feel that you could not follow that charge in sitting as jurors in the case?

(No response from the jurors)

The attitude expressed by this juror does not show sufficient evidence of bias or unwillingness to consider the evidence in light of applicable law as charged by the court to require his dismissal for cause. Westbrook v. State, 242

Ga. 151(3) (249 SE2d 524) (1978), cert. denied, 439 U.S. 1102 (99 SC 881, 59 LE2d 63) (1979). This enumeration is without merit.

12. In his twenty-first enumeration, Godfrey contends that this court improperly reviewed his sentence, resulting in a disproportionate and excessive sentence. He submits in support of this enumeration that in the "opinions of this Court upholding death sentences in several other 'domestic murder' and multiple murder cases, the Court cited appellant's case as being a proper case for the imposition of a sentence of life imprisonment." No cases are cited in the appellant's brief as authority for this observation and there are none.

We have previously reviewed Godfrey's sentence pursuant to OCGA § 17-10-35 on direct appeal in order to determine whether the sentence of death was excessive or disproportionate to the sentences imposed in similar cases. Godfrey v. State, 248 Ga. 616 (287 SE2d 218) (1981). We decline to take it up again here. Therefore, we find no merit in this enumeration.

13. In his twenty-second enumeration Godfrey contends that the method of execution in Georgia, electrocution, is unconstitutional in that it violates the Eighth Amendment guarantee against cruel and unusual punishment. The U. S. Supreme Court long ago rejected this contention and has more recently refused to reconsider its decision. See In re Kemmler, 136 U.S. 436 (10 SC 930, 34 LE 519) (1890); Collier v. State, 244 Ga. 553(18) (261 SE2d 364) (1979), cert. denied, 445 U.S. 946 (100 SC 1346, 63 LE2d 781) (1980).

15. Finally, Godfrey claims that denial of his pre-habeas corpus hearing motion for funds to support the preparation and presentation of his case violates his right to equal protection and due process of law. Petitioner fails to cite any authority in support of his contention. To the contrary, there are decisions of this court resolving

this issue of public funds for indigents filing habeas corpus petitions against the appellant's position. See Stevens v. Balkcom, 245 Ga. 492 (265 SE2d 596) (1980), Harris v. Hopper, 243 Ga. 244 (253 SE2d 907) (1979). In light of these cases denial of such funds does not violate the constitutional right cited by Godfrey and we find no merit in this enumeration.

Judgment affirmed. All the Justices concur, except Hill, P. J., and Gregory J., who dissent.

39843. GODFREY v. FRANCIS, Warden.

HILL, Chief Justice, dissenting.

I dissent to the imposition of the death penalty in this case for the reasons stated in my dissenting opinion in Godfrey v. State, 248 Ga. 616, 625 (284 SE2d 422) (1981).

39843. GODFREY v. FRANCIS

GREGORY, J., dissenting.

In Division 11, this court considers Godfrey's contention that the trial court erred by refusing to excuse for cause two potential jurors who indicated their unwillingness to return a life sentence in a case of murder with aggravating circumstances. Despite having ample opportunity to raise this issue in his direct appeal, Godfrey failed to do so. This claim of error is thus presented to us for the first time on collateral review, two years after Godfrey's death sentence was affirmed on direct review. I would prefer not to allow collateral review of a claim which could so easily have been resolved previously. However, the law applicable to this habeas corpus case does not allow that choice. Having considered, as I must, Godfrey's contention on its merits, I find that I cannot agree with the majority that the trial court's refusal to excuse the first of these two potential jurors was not error. Reluctantly, I dissent to Division 11 and the judgment.

It is well settled that a juror who is unable to impose a death sentence is subject to disqualification in a case in which the state is seeking the death penalty. Witherspoon v. Illinois, 391 U. S. 510 (88 SC 1770, 20 LE2d 776) (1968). This court fails to resolve the important question of whether "the same standard should apply to venire members whose dismissal is sought because of their views in favor of the death penalty as to those who oppose it." Perhaps for this reason, the court also fails to delineate the scope of proper questioning in this regard.

In fact, the basis for this court's finding of no error is altogether unclear. The court holds that a defendant cannot "create error" by improper questioning; thus implying that the questioning was improper and that, no matter what the juror's answer to an improper question, he is not disqualified. But the court also implies that the juror's answers were not disqualifying in any event. Then the court suggests that even if the answers were, in themselves, disqualifying, the juror was rehabilitated. My dissent is premised upon my disagreement with all of these possible conclusions and upon my belief that the same standard should apply to potential jurors whose dismissal is sought because of their views in favor of the death penalty as to those who oppose it.

1. In my view, a juror who is unable to decide a case on its merits is not qualified to serve. Thus, a juror who is unable to impose a death penalty when the death penalty is authorized, regardless of the evidence, is subject to excusal for cause. By the same token, a juror who is unable to consider the imposition of a life sentence when a life sentence is authorized, regardless of the evidence, should be excused for cause upon challenge by the defendant.

2. Voir dire should allow both parties an opportunity to ascertain the ability of prospective jurors to decide the case on its merits, with objectivity and freedom from bias and prior inclination. Whitlock v. State, 230 Ga. 700 (198 SE2d 865) (1973). As we stated in Jordan v. State, 247 Ga. 328 (276 SE2d 224) (1981), "after the usual voir dire questions have been put by the court, . . . the counsel for either party shall have the right to inquire of the individual jurors examined touching any matter or

thing which would illustrate any interest of the juror in the cause, including any opinion as to which party ought to prevail. . . . Although a juror may have been acceptable . . . when questioned by the court, the juror may be shown to be partial when questioned by the state or defense and if such showing is made, the juror should be stricken for cause." Id. at 338-339.

After ruling on several occasions that Godfrey's attorney could not ask the juror in question "if there are circumstances under which he would not follow the instructions of the court," the trial court finally allowed counsel to ask, "[w]ell assume there's a murder, two murders with aggravating circumstances proved to your satisfaction, would you be able to, considering your opinion previously stated, would you be willing or able to consider a sentence less than death under those circumstances and follow the law that allows it?"

The majority implies that this question was improper because it solicited "the juror's views on evidence not yet presented and the law to be applied in the case at hand." I fail to see how the question solicited the juror's views on the law except as it attempted to ascertain whether the juror would be able to follow the law, which, in my view, was not improper. The only items of evidence mentioned are: "two murders" and "aggravating circumstances."

I realize that questions incorporating facts yet to be proved are often improper. Waters v. State, 248 Ga. 355 (3) (283 SE2d 238) (1981). Neither party is entitled, as of right, to outline all the evidence and then ask a juror what his verdict would be on that evidence. Ibid. However, except in cases of treason or aircraft hijacking,

the death penalty may not be imposed unless a murder has been committed and statutory aggravating circumstances have been proven. OCGA § 17-10-30 (c); Coker v. Georgia, 433 U. S. 584 (97 SC 2861, 53 LE2d 982) (1977). A question which merely inquired whether a juror could consider a sentence less than death would be useless. Presumably, no one would contend that the death penalty should be imposed in all criminal cases. The important question is whether a juror authorized to impose the death penalty would automatically do so.

I would hold that the only portion of counsel's question which was possibly objectionable was his reference to "two murders." In my view, counsel was entitled to inquire whether the juror was "willing or able to consider a sentence less than death" in a case involving murder with aggravating circumstances.

3. I cannot agree with the majority's implicit suggestion that a juror's answer to a question that may be, in part, objectionable, will not, under any circumstances, disqualify the juror. In Aycock v. State, 188 Ga. 550 (12) (4 SE2d 221) (1939), this court recognized that an answer of a juror might disqualify him even if the question were improper. As we noted, if the allegedly improper questions had not been posed, "and the prospective jurors had voluntarily stated their opposition to a conviction upon circumstantial evidence, it would have been the duty of the court to disqualify them." Id. at 569. See also, Bradham v. State, 243 Ga. 638 (256 SE2d 331) (1979) (reversing 148 Ga. App. 89 (250 SE2d 801) (1978); s.c. after remand, 150 Ga. App. 540 (258 SE2d 252) (1979).

4. I cannot agree with the majority's finding that the juror's answer was not "a clear, adamant expression of

a fixed opinion that would be unyielding in spite of law or evidence which required a contrary finding." The majority misstates the test for disqualification. If a defendant is convicted of murder (as Godfrey had already been at the time of this voir dire) and a statutory aggravating circumstance is shown, the jury may, in its discretion, impose a death or a life sentence; neither is required. I believe the test should be whether a juror authorized to impose a death penalty would automatically do so, regardless of the evidence.

To counsel's query, ". . . would you be willing or able to consider a sentence less than death under those circumstances and follow the law that allows it?" -- the juror answered, "No, I'd go for the death sentence."

The juror's answer could not have been clearer. He was neither willing nor able to even consider a life sentence or to follow the law that allows it. I would hold that he was disqualified to serve in this case.

5. Under the circumstances of this case, I cannot agree that the juror was rehabilitated. The majority notes that the day after this juror underwent voir dire, the court reminded the entire panel that, "You can and should consider the life sentence in any event based on the evidence. I would ask all of you if you have any pre-judgment that you could not follow those instructions if you're selected as a juror." It is doubtful that a negative answer to this question could rehabilitate the juror in any event, in view of our holding in Cofield v. State, 247 Ga. 98 (2) (274 SE2d 530) (1981), that it is not sufficient that a juror be willing to "consider" the death penalty if he or she is committed to automatically vote against the death penalty after having "considered" it.

Moreover, in this case, we can't know for sure that the juror in question was present when the panel was asked the rehabilitative question.

6. I would hold that the trial court erred by refusing to exclude the aforementioned juror and would reverse.

APPENDIX B

IN THE SUPREME COURT OF GEORGIA

ROBERT FRANKLIN GODFREY, Appellant	:	
v.	:	Habeas Corpus No. 5692
ROBERT FRANCIS, Warden, Georgia Diagnostic and Classification Center, Appellee	:	

MOTION FOR REHEARING

Comes now appellant, by counsel, and moves this Court to rehear this appeal from the denial of a petition for a writ of habeas corpus in a death penalty case. On November 4, 1983, this Court affirmed the decision of the lower court. Pursuant to Rule 47 of the Rules of the Supreme Court of the State of Georgia, appellant moves this Court for rehearing and expressly does not waive his other enumerated errors. Appellant asks this Court to reconsider the issue whether the trial court erred in refusing to excuse for cause two potential jurors who indicated an unwillingness to return a life sentence in this case.

We request that this Court reconsider this issue as set forth in Petitioner's Memorandum of Law in Support of Petition for a Writ of Habeas Corpus (pages E1-E4) and also ask that the Court consider case law from neighboring jurisdictions, as set forth below. While we recognize these decisions are not binding on this Court, they do provide a framework as to how other Courts have resolved this issue. We further request this Court to set this issue down for rehearing and a full rebriefing.

In support of this Motion, appellant states:

THE TRIAL COURT'S REFUSAL TO EXCUSE FOR CAUSE TWO JURORS WHO STATED THEIR UNWILLINGNESS TO RETURN A SENTENCE LESS THAN DEATH VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHTS.

The Fourteenth Amendment guarantees a criminal defendant a fair trial by a panel of impartial, indifferent jurors. Irwin v. Dowd, 366 U.S. 717, 722 (1961). Prejudice, bias, or any form of predisposition by the trier of fact constitutes a violation of the defendant's due process rights. Id.; see also, In Re Murchison, 349 U.S. 133 (1958); Tumey v. Ohio, 273 U.S. 510 (1927). In the sentencing phase of a death penalty trial, an "unbiased" jury requires that the jurors be able to fully and completely consider a sentence less than death without any preconceived beliefs as to the imposition of a death sentence. In this case, two jurors -- jurors Powell and Bright -- asserted their opinions that they could not consider a sentence less than death. The trial court refused to strike either of these two jurors for cause.

This manner of jury selection constitutes a violation of appellant's due process rights. Crawford v. Bounds, 395 F.2d 297, 304 (4th Cir. 1968). The law recognizes that "a challenge [for cause] should be sustained to a juror whose testimony 'made it reasonably certain that, in the event of conviction for murder in the first degree, he would render no other verdict than one which required capital punishment.'" Id at 304.

The fact that these two jurors were excused peremptorily by the defense does not affect the constitu-

tional violation. The right of either party to exercise their peremptory challenges in a full, fair and effective manner is well established. Swain v. Alabama, 380 U.S. 202, 218-220 (1965). The denial or the impairment of the right is reversible error without a showing of prejudice, "for it is, as Blackstone says, an arbitrary and capricious right, and it must be exercised with full freedom, or it fails its full purpose." Id at 219, citing Lewis v. United States, 146 U.S. 370, 378 (1892). Requiring appellant to use his limited number of peremptory challenges on jurors who should have been excluded for cause deprived him of the use of those challenges against other jurors, thereby dnying him a full and effective jury selection process. Bradham v. State, 243 Ga. 638, 256 S.E.2d 331 (1979); Pierce v. State, 604 S.W.2d 185 (Tex. 1980).

This exact issue was considered in Florida, in Thomas v. State, 403 So.2d 371 (Fla. 1981). In a per curiam opinion, the court reversed a murder conviction and ordered a new trial, finding error in the trial court's failure to excuse "for cause" a single juror who stated he could not recommend any mercy in the sentencing phase of the trial. The court found this presence of bias in the juror violated the defendant's Sixth Amendment right to an impartial jury. Id.at 374, citing Stroud v. United States, 251 U.S. 15 (1919) and Crawford v. Bounds, 395 F.2d 297 (4th Cir. 1968).

The Texas courts, considering the same issue, found constitutional error requiring reversal in three cases

where the trial court refused to excuse for cause a single juror who indicated an unwillingness to consider a sentece other than death. Pierce v. State, 604 S.W. 2d 185 (Tex. 1980); Cuevas v. State, 575 S.W.2d 543 (Tex. Cr. App. 1978); Smith v. State, 573 S.W.2d 763 (Tex. Cr. App. 1977).

In Cuevas, and Smith, the court held that reversal was required even though the jurors were "rehabilitated" during voir dire, responding finally that they would consider both options or follow the court's instructions of law. The court reasoned that the jurors' responses, taken as a whole, showed an inability to consider the full range of punishment:

> It is too mechanistic to reason that Payne was a qualified juror because he was willing to require the state to prove beyond a reasonable doubt special issues submitted at the punishment stage. The law requires this, and in addition, requires that each juror consider the full range of punishment applicable to the offense in question.

Smith v. State, supra, 573 S.W.2d at 766.

This analysis, which also was set forth in the dissenting opinion in the instant case by Justice Gregory, requires the court to examine the full range of a juror's answers to determine if bias in fact exists. Once a juror has asserted his/her unwillingness to consider a sentence less than death, the court cannot "rehabilitate" that juror simply by eliciting a response that he/she will consider all the evidence and the law as the court instructs. This Court established this principle in Cofield v. State, 247 Ga. 98, 274 S.E.2d 530 (1981), where it held it was not error for the trial court to

refuse to allow the defense attorney to attempt to rehabilitate a juor excused on Witherspoon grounds, reasoning:

> It is not sufficient that the juror be willing to consider the death penalty if he or she is committed to automatically vote against the death penalty after having considered it.

Cofield v. State, supra, 274 .S.E.2d at 530.

This Court cannot apply a different standard to those potential jurors who assert an unwillingness to consider life rather than an unwillingness to consider death.

> To permit a juror whose mind is foreclosed on one side of that issue to serve, while eliminating those who think to the contrary, and to exert special effort to qualify one whose mind may be foreclosed on the issue of guilt while freely excusing those who indicate a predisposition as to punishment, were not the ways to achieve the constitutional objective. Denial of equal treatment in the manner of selection inevitably resulted in denial of due process.

Crawford v. Bounds, 395 F.2d at 297, 304 (4th Cir. 1968) (emphases added).

Jurors Powell and Bright both indicated an unwillingness to consider a sentence less than death. The trial court's refusal to excuse them for cause would have allowed them to apply on a personal basis the very thing that was condemned by the U.S. Supreme Court in Woodson v. North Carolina, 428 U.S. 280 (1976) and Roberts v. Louisiana, 428 U.S. 325 (1976): a mandatory death penalty "that accords no significance to relevant facts of the character and record of the individual offender

or the circumstances of the particular offense." Woodson v. North Carolina, supra, 428 U.S. at 304. Based on this error in the instant case, appellant's death sentence should be set aside.

WHEREFORE, appellant respectfully requests this Court to review and reconsider its decision of November 4, 1983 and to reverse the ruling of the lower court denying appellant's petition for a writ of habeas corpus.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I, Gerald I. Fisher, hereby certify that one true and accurate copy of the foregoing Motion for Rehearing was mailed to Mary Beth Westmoreland, Office of the Attorney General, 132 State Judicial Bldg, Atlanta, Ga. 30303, this 14th day of November, 1983.

Gerald I. Fisher
GERALD I. FISHER

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

83-6215

ROBERT FRANKLIN GODFREY
Petitioner,

v.

ROBERT FRANCIS, Warden
Georgia Diagnostic and
Classification Center,
Respondent

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SUPREME COURT, U.S.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now, Petitioner, Robert Franklin Godfrey, by counsel, in the above-styled action and moves this court for leave to proceed in forma pauperis without first being required to prepay fees or costs or otherwise to give security therefore. In support of this Motion, Petitioner states that he has been permitted to proceed in forma pauperis at trial, on appeal to the Georgia Supreme Court and the Supreme Court of the United States at his retrial and in State habeas proceedings. Petitioner is presently incarcerated on death row in Georgia. He has been incarcerated since the time of his arrest.

Respectfully submitted,

Robert Franklin Godfrey
ROBERT FRANKLIN GODFREY
BY COUNSEL

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COUNSEL FOR PETITIONER

No. 83-6215

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

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ROBERT FRANKLIN GODFREY,

Petitioner,

-v-

ROBERT FRANCIS, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

AFFIDAVIT OF POVERTY

AFFIDAVIT OF POVERTY

I, ROBERT FRANKLIN GODFREY, declare that I am the Petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor, and that I believe that I am entitled to relief.

1. Are you employed? Yes _____ No ✓

   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer. _____

   b. If the answer is "no," state the date of last employment, and the amount of salary and wages per month which you received. 9/20/77

2. Have you received within the last twelve months any money from the following sources?

   a. Business, profession or form of self-employment? Yes___ No ✓
   b. Rent payments, interest, or dividends? Yes___ No ✓
   c. Pensions, annuities, or life insurance payments? Yes___ No ✓
   d. Gifts or inheritance? Yes___ No ✓
   e. Any other sources? Yes___ No ✓

3. Do you own any cash, or do you have any money in any checking or savings account?

Yes ✓ No _____ (Include any funds in prison account). If the answer is "yes," state the total value of the items owned. $144.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?
Yes _____ No ✓

If the answer is "yes," describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute to their support.
none

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Robert F. Godfrey

ROBERT FRANKLIN GODFREY